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## Commentary on John Makdisi's "Survey of AALS Law Schools Teaching Islamic Law"

Lama Abu-Odeh

John Makdisi's survey raises two questions: what is "Islamic law"? And, why is it a good idea to teach it in American law schools? The answer to the first question is not as straightforward as it might seem and the answer to the second largely depends on the answer to the first.

The term *Islamic law* encompasses two meanings. The first identifies Islamic law as the law derived from Islamic religious sources by Muslim jurists, sources defined as the Quran and prophetic traditions; rules derived through analogy to rules identified in these sources; and rules selected through consensus by these same jurists. In this first meaning, Islamic Law refers to a largely historic system that had emerged roughly in the ninth century AD, was highly formalized around the eleventh and twelfth centuries, but largely came to an end as a legal system effectively applicable to Muslims in the nineteenth century.

The second meaning of Islamic Law is the law of the Islamic world. In this second meaning, Islamic law is the law applied to Muslims living in the Islamic world today. It includes the codes, statutes, and regulations that have accompanied the emergence of the modern state in the Islamic world following the collapse of the last Islamic Caliphate, the Ottoman Empire, in 1914. The origins of these laws lie in the European legal transplants introduced by the colonial powers to the Islamic world in the nineteenth and first half of the twentieth centuries. Such transplants took on a life of their own in the new localities—so much so that their descendants, the contemporary positive laws of the Islamic world, constitute the bulk of the contemporary legal system in this world. Islamic law in the first sense exists in the contemporary system in a rudimentary form and is mostly embedded in the rules on the family.

John Makdisi's survey seems to be investigating the teaching in American law schools of Islamic law in the first sense: the medieval Islamic law no longer in place anywhere except, perhaps, Saudi Arabia. His advocacy of more translations of Arabic sources gives his approach away. Most medieval sources

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were written in Arabic, the privileged language of the religious sources from which this religious law derived. Contemporary laws in the Islamic world, on the other hand, are written in the national language of the state. It would seem odd to concentrate on Arabic to learn more about Indonesian law or Malaysian law or Persian law.

The question is why? Why should a foreign legal system that is no longer in place be taught in American law schools? One might be impressed by the number of courses that are taught under the name of Islamic law in the U.S. legal academy and that are interested primarily in a medieval system. Rather than feeling, as Makdisi seems to do, that it is a relatively rare occurrence and that we should encourage law schools to adopt more such courses, I am baffled by the fact that a non-existent system would have such cachet. I doubt that it has an equivalent in contemporary American legal academia.

So what explains this peculiar pedagogical phenomenon? The answer is complicated. Professors in the field of Islamic Law in the United States are either religious Muslims or cultural pluralists who feel that the contemporary legal system in the Islamic world has no legitimacy because it is based on foreign transplants and does not therefore represent Muslim culture, history, tradition, and the like. Concentrating on the medieval system is a way of teaching Americans something that is *truly* Islamic and peculiar to Muslims, something *truly* different and therefore worthy of a comparative exercise. If one were to teach contemporary law in the Islamic world one would be teaching not a system that is *different*, but rather one that is familiar: either common law or civil law (the prevailing transplanted systems in the Islamic world). The problem would be that the Islamic world instead of appearing different and exotic would appear familiar and intimate. That is not to say that humanizing the Muslims is not a goal of these scholars; they would simply rather do it through "understanding the difference" rather than through "recognizing the familiar and the same."

Such scholars tend to give the impression in their pedagogy either that the medieval system is still in place or still dominant or that their students should reconstruct the medieval to make it more modern. They give the impression it is still dominant by beginning their courses with the study of the medieval and continue by pursuing a trail of the Islamic law that remains in the contemporary legal system despite the marginalization of those elements of the medieval that have survived. The centering of the medieval is so pervasive in these courses that contemporary law is almost completely ignored—or at least its hybrid complexity in which the Islamic is only a marginal element in the system is never expounded upon. Since the contemporary is illegitimate, it must then be transitory and temporary, and the only legitimate system to replace it would be the medieval since it is the truly Islamic one, and the medieval can only have the power to replace the contemporary if it is reconstructed to become modern.

Another factor influencing this peculiar pedagogical phenomenon is the influence of religious American Muslim students on the construction of courses

on Islamic law. Religious Muslim students in the United States are preoccupied with their religious and cultural difference as a way of establishing their unique identity. They want there to be a law peculiar to Muslims, one that is different from Western law, one that can prove its equality if not superiority to Western legal systems. Since their attachment to Islamic law takes the form of private religious practice, this minority is indifferent to the fact of its disappearance from the contemporary legal systems in the Islamic world. For them, Islamic law is the law of the believers wherever they might be. Some Islamic law scholars tend to cater to the needs of this religious minority. A distortion unfortunately results. The law of religious practice becomes confused with the law of Muslims as nationals of states. Nation states are eroded, national laws disappear as irrelevant, and a whole region of the world remains virgin territory as far as its laws are concerned: these laws wait to be identified and theorized. Legal pedagogy in the Islamic world bears no relation to pedagogy on law in the Islamic world in the United States.

This peculiar distortion is not the work solely of Islamic law scholars. Western comparatists are just as implicated. They too desire that there be this other "legal family" of religious law that dominates the Islamic world. Formerly that desire allowed scholars to assert the superiority of the Western legal family (civil law and common law); today it allows them merely to assert the pluralism of legal systems. Insisting on the "greatness" of the Islamic legal system in the name of cultural pluralism is no less inaccurate than asserting its inferiority in the name of civilizational difference. Islamic medieval law is just that—medieval; what needs to be taken on seriously is the contemporary legal even at the risk of experiencing it as terrifyingly Western and uncannily familiar.

We need to stop approaching the Islamic world through the prism of religion, culture, and history and start approaching it as a modern product of the colonial experience, with all its complexity. This may indeed require that we approach its contemporary law with the same tools, methodologies, and conceptual structures that we use to understand American law. We need to stop relying on "cultural relativism" as the prism through which the Islamic law is introduced to students and law review readers and instead use analysis and critique of contemporary laws and the way they affect contemporary Muslims.

No more articles on "Democracy," "Constitutionalism," and "Jihad" under Islamic law, with the endless mining of medieval sources to prove that the Islamic law is good and liberal, and more "how do the rules on property in the Jordanian civil code affect the distribution of wealth in that country?"

In short: No more Islamic law courses, and more, much more, *Laws of the Islamic World!*